United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit

76-4204

To be argued by
ROBERT S. GROBAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4204

TIM LOK,

Petitioner,

—against—

IMMIGRATION and NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Preliminary Statement

Pursuant to Section 106 of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1105a, Tim Lok petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals ("Board") on July 30, 1976. The Board's order: (1) affirmed the findings of Immigration Judge Ira Fieldsteel that Tim Lok was deportable because of his conviction under the narcotics laws of the United States; (2) affirmed the Immigration Judge's conclusion that Tim Lok was ineligible for Section 212(c) relief on two grounds; and (3) added that Tim Lok also was ineligible for Section 212(c) relief because, under its long standing interpretation of that section, he had not lawfully resided in the United States for seven years following his admission to permanent residence in this country.

It is the Immigration and Naturalization Service's ("Service") position that the petition for review should be dismissed because: (1) the Board's interpretation of Section 212(c) is a reasonable one, given the statutory and legislative history of that section, which is entitled to deference from this Court; and (2) even if the Board's interpretation was not reasonable, Tim Lok is ineligible for Section 212(c) relief as a matter of law.

Issues Presented

1. Whether the Board's decision, affirming the Immigration Judge's conclusion that Tim Lok was ineligible for relief under Section 212(c) of the Act, was a reasonable interpretation of that provision which should be affirmed?

2. Whether, even if Tim Lok's interpretation of Section 212(c) is adopted by this Court, he is ineligible for relief as a matter of law?

Statement of the Facts

The petitioner, Tim Lok, is an alien who is a native and citizen of China and who was admitted to the United States initially in 1959 as a crewman, authorized to remain a maximum of twenty-nine days (AR 21).* At the expiration of his authorized stay Tim Lok failed to depart or to obtain any extension of his authorized stay in this country (AR 108).

Tim Lok evaded detection by the Service until October 8, 1965 when a private bill was introduced in his

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* References preceded by the letters "AR" are to the certified administrative record previously filed with the Court.

behalf in the United States Senate and the Service was notified of this action. As a result, the Service requested Tim Lok to appear on October 19, 1965 for an interview regarding the bill and his unlawful presence in this country.

On October 19, 1965 Tim Lok appeared at the Service office in New York for his interview. Based on the information obtained at this interview and contained in his administrative file, the Service initiated deportation proceedings against Tim Lok on that date by issuing an order to show cause against him (AR 109). The order to show cause charged Tim Lok with remaining in the United States unlawfully after his authorized stay expired in 1959 and notified him to appear on October 26, 1965 at a deportation hearing to determine the validity of that allegation (Id.).

At his deportation hearing Tim Lok admitted the truth of the allegation contained in the order to show cause and requested the privilege of voluntary departure to Hong Kong, representing that he was willing and financially able to depart promptly from the United States. The Immigration Judge granted this request but also entered an order of enforced deportation if Tim Lok failed to depart voluntarily "within such time and under such conditions as the district director shall direct." (AR 108).

On November 30, 1965 the Service's New York District Director notified Tim Lok that, pending Congressional action on his private bill, he would not be deported but would be permitted to remain in the United States "until August 1, 1966, or 30 days following adverse action on the bill, whichever occurs sooner." The notice also warned Tim Lok that "This permission

may be revoked upon 30 days' notice." (AR 107). When no action was taken by August 1, 1966 with respect to Tim Lok's bill, the District Director permitted him to remain until February 1, 1967 under the same conditions (AR 106).

Congress failed to act on the legislation introduced for Tim Lok and the Service notified him that he was granted a final extension of his voluntary departure time until March 2, 1967 and that, if he failed to depart voluntarily, he would be deported pursuant to the Immigration Judge's alternative order of deportation (AR 105). One day before his extension expired, another private bill was introduced on Tim Lok's behalf. Again, the Service notified Tim Lok that it would not enforce his deportation while this bill was pending and granted him an extension of his stay until February 1, 1969 (AR 104).

Subsequently, Congress failed to enact this second bill and Tim Lok was notified to depart voluntarily from the United States before March 3, 1969 or face enforced deportation (AR 103). The day before this notice was sent to Tim Lok, his recent bride, a United States citizen, filed a petition with the Service to classify Tim Lok as her immediate relative for immigration purposes (AR 66-67).[1] Pursuant to Service policy, Tim Lok's deportation was not enforced and he was permitted to remain in this country while this petition was adjudicated.[2]

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[1] Section 201(b) of the Act, 8 U.S.C. § 1151(b), provides that immediate relatives of United States citizens may be admitted to permanent residence in this country without regard to quota limitations.

[2] *See Noel* v. *Chapman*, 508 F.2d 1023, 1026 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3201 (October, 1975).

On January 30, 1970 the District Director approved the petition and forwarded it, together with its supporting documents, to the United States Consulate in Hong Kong where Tim Lok had to go to apply for his immigrant visa to obtain lawful permanent residence in this country (AR 67-9).[3] Again, Tim Lok's deportation was not enforced, although he remained under the Immigration Judge's 1965 order of deportation, because of the benevolent Service policy permitting beneficiaries of approved petitions to remain in this country until they can obtain an appointment at the appropriate United States Consulate to apply for their immigrant visas.[4]

On October 25, 1971, Tim Lok departed for Hong Kong to apply for his visa (AR 62-4). Subsequently, when the Service was notified of his departure, it issued a warrant of deportation against him and executed it noting that Tim Lok had effected his own deportation pursuant to Section 101(g) of the Act, 8 U.S.C. § 1101 (g), which provides that any alien who voluntarily departs from the United States while under an order of deportation is "considered to have been deported pursuant of law, irrespective of the source from which the expenses of his transportation were defrayed, or of the place to which he departed." (AR 100-01).

At this time Tim Lok did not dispute the Service's statutory responsibility to consider him deported. Instead, on November 22, 1971, he recognized this deportation by applying for "permission to reapply for admission to the United States after deportation or removal"

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[3] Section 245 of the Act, 8 U.S.C. § 1255, prohibits aliens, who entered this country as crewmen and overstayed their authorized stays, from adjusting their status to that of aliens lawfully admitted to permanent residence while in the United States.

[4] *See* footnote 2, *supra*.

(AR 102).[5] On November 29, 1971 Tim Lok's application for permission to reapply was granted (Id.). Tim Lok was then issued his immigration visa by the Consul in Hong Kong which he used together with his waiver of excludability to reenter the United States on December 26, 1971 as a permanent resident (AR 61).

Less than one year after he was admitted to permanent residence in this country, Tim Lok was arrested and indicted with three co-defendants for possessing, with the intent to distribute, approximately twenty pounds of heroin (AR 53-60). On January 3, 1973 Tim Lok pleaded guilty to this charge and was sentenced to imprisonment for a period of five years (AR 51-2).[6]

Following Tim Lok's narcotics conviction, the Service instituted another deportation proceeding against him on March 29, 1973 by serving him with a second order to show cause at the Federal House of Detention in New York City, New York (AR 48). In this show cause order, the Service alleged that Tim Lok was deportable under Section 241(a)(11) of the Act, 8 U.S.C. § 1251

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[5] Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17), provides that aliens, such as Tim Lok, who have been deported are excludable from admission to this country unless the Attorney General consents to their readmission by waiving this ground of excludability.

[6] Also convicted with Tim Lok was Guan Chow Tok. Tok was subsequently found deportable by the Service, and the Board, and appealed these decisions to this Court in *Guan Chow Tok* v. *Immigration and Naturalization Service*, 538 F.2d 36 (2d Cir. 1976). On July 8, 1976, this Court dismissed Tok's appeal in a *per curiam* opinion noting, *inter alia*, that since he had not been a permanent resident for seven years, he was ineligible for Section 212(c) relief. *Guan Chow Tok* v. *Immigration and Naturalization Service*, *supra* at 38.

(a) (11),[7] and notified him that a hearing would be held to determine the validity of this charge as soon as he was released from prison (AR 48-9).

On April 21, 1975 Tim Lok's deportation hearing was held before Immigration Judge Fieldsteel and in the presence of an interpreter (AR 31). At this hearing Tim Lok was represented by counsel who conceded the truth of the allegations contained in the order to show cause and submitted an application for discretionary relief under Section 212(c) of the Act, 8 U.S.C. § 1182 (c), contending that Tim Lok was eligible for consideration under this provision (AR 32-4).[8] Judge Fieldsteel accepted the application and reserved decision on its merits (AR 38).

On May 29, 1975 Judge Fieldsteel issued his decision. In that opinion he found Tim Lok to be ineligible for Section 212(c) relief because he had been deported in 1971 and because, in 1975, he could not be said to be returning to seven years lawful domicile in this country (AR 25-8). As a result, the Judge ordered Tim Lok to be deported to the Republic of China on Formosa (AR 28).

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[7] Section 241(a)(11) of the Act provides for the deportation of any alien who has been convicted of violating any law or regulation relating to the illicit possession of or traffic in narcotic drugs.

[8] To be eligible for Section 212(c) relief, an alien must show that:

a) He has been admitted to permanent residence;
b) He left the United States temporarily and not under an order of deportation; and
c) He is returning to a lawful unrelinquished domicile of seven consecutive years.

If the alien fails to establish any one of these requirements, he is ineligible as a matter of law to be considered for relief under this section of the Act. *See* Gordon and Rosenfield, *Immigration Law and Procedure*, Section 7.4 Section 24(b)(1966).

On June 2, 1975 Tim Lok filed a notice of appeal to the Board of Immigration Appeals (AR 19-20). In that notice he stated he was appealing from that portion of Judge Fieldsteel's decision which found him ineligible for Section 212(c) relief but that he did not wish to file any written brief or statement in support of this contention (AR 19). On July 30, 1976 the Board affirmed the decision of the Immigration Judge and dismissed Tim Lok's appeal (AR 8-11). In its opinion the Board found Judge Fieldsteel's decision to have been correct and added, pursuant to its longstanding interpretation of Section 212(c), that Tim Lok was ineligible for relief under its provisions because he did not have seven years lawful domicile in this country following his admission to permanent residence (AR 10-11).

With the adverse decision of the Board of Immigration Appeals, Tim Lok was subject to deportation by the Service pursuant to Judge Fieldsteel's decision. As a result, on August 11, 1976 he applied to the Service for a stay of deportation, based on the alleged hardship that would befall his wife and step-children if he were forced to return to Taiwan (AR 4-7). On August 24, 1976, Tim Lok's application was denied and the next day a warrant of deportation was issued against him (AR 1).

Subsequently, on September 8, 1976, Tim Lok filed a petition with this Court seeking to set aside the deportation order entered by Immigration Judge Fieldsteel and to reverse the Board's decision that he was ineligible for relief under Section 212(c). Tim Lok has since remained in the United States pursuant to the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

ARGUMENT

POINT I

The Board's Decision, Affirming The Immigration Judge's Conclusion That Petitioner Was Ineligible For Relief Under Section 212(c) Of The Act, Was A Reasonable Interpretation Of That Provision Which Should be Affirmed.

A. Introduction

The United States Supreme Court and the Courts of this Circuit have continually and steadfastly affirmed Congress' plenary power to establish criteria for the admission of aliens to the United States. *Kliendienst* v. *Mandel*, 408 U.S. 753 (1972); *Francis* v. *Immigration and Naturalization Service*, *supra* at 272. Pursuant to this broad authority Congress enacted Section 212(c) Act 8 U.S.C. § 1182(c), which empowers the Attorney General in his discretion to admit to this country certain aliens who comply with its eligibility requirements and who otherwise would be unable to enter the United States.[9] The Attorney General, in turn, has delegated to the Service his responsibility to ascertain whether applicants for Section 212(c) relief are statutorily eligible and has authorized it to interpret the provisions of that statute to aid these determinations.[10]

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[9] In general, Section 212 of the Act, 8 U.S.C. § 1182, sets forth certain classes of aliens who, for varying reasons, Congress has made ineligible for admission to the United States. Section 212(c) enables the Attorney General, in his sole discretion, to waive these grounds of exclusion for aliens who comply with its eligibility requirements.

[10] Section 103 of the Act, 8 U.S.C. § 1103.

Petitioner, Tim Lok, requested Section 212(c) relief from the Immigration Judge at his second deportation hearing on April 21, 1975.[11] In his application he asserted that he was statutorily eligible for this relief and contended that it should be granted to him as a matter of discreion. His request was denied by the Judge who found him ineligible *as a matter of law* on two grounds: because his 1971 departure to Hong Kong had not been "voluntary and not under an order of deportation" but had been pursuant to the 1965 deportation order[12] which was in effect at that time[13] and which precluded his subsequent re-entry without a waiver of excludibility;[14] and because in 1975, even if his departure had been voluntary, he nevertheless could not return to "a lawful unrelinquished domicile of seven consecutive years" since he had not

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[11] While on its face the provisions of Section 212(c) of the Act, 8 U.S.C. § 1182(c), appear to apply only to excludable aliens who are seeking admission to the United States, the Board in its decisions and the Service in its regulations have extended the ambit of its provisions to include deportable aliens who, if deported, would be eligible for relief under its provisions if they sought to return to the United States. *Matter of G.A.*, 7 I. & N. Dec. 274 (1956); 8 C.F.R. § 212.3.

[12] Section 101(g) of the Act, 8 U.S.C. § 1101(g), provides that an alien who departs voluntarily while under an order of deportation shall be considered to have been deported, regardless of who paid for his transportation. *See* Point II-B, *infra.*

[13] There is no period of limitation during which a deportation order must be enforced. Thus, it does not become invalid or unenforceable through mere lapse of time or because of dilatoriness or laches on the part of the Service in effecting the deportation. *Spector* v. *Landon*, 209 F.2d 481 (9th Cir. 1954); *Circella* v. *Sahli*, 216 F.2d 33 (7th Cir. 1954), *cert. denied*, 348 U.S. 964 (1955); Gordon and Rosenfield, *Immigration Law and Procedure*, § 5.19, page 5-207 (1976).

[14] *See* footnote 5, *supra.*

resided *lawfully* in this country until 1971 when he was admitted to permanent residence (AR 21-8).[15]

The Immigration Judge's conclusion was appealed to the Board of Immigration Appeals ("Board"). In its decision the Board affirmed the decision of the Immigration Judge but addressed itself only to the question of whether Tim Lok could be considered returning to a lawful domicile of seven years. On this issue the Board concluded, on the basis of its long standing interpretation of that provision in *Matter of S*, 5 I. & N. Dec. 116 (BIA 1953), that to be eligible for Section 212(c) relief Tim Lok had to have lived here for seven years following his admission for permanent residence and that, since Tim Lok had only been admitted to permanent residence in 1971, he obviously could not meet this requirement (AR 8-11).

Subsequently, Tim Lok petitioned this Court to set aside the order of deportation entered by the Immigration Judge and affirmed by the Board's decision, contending that both represented erroneous interpretations of the provisions of Section 212(c).[16] Specifically, Tim Lok's major claim is directed at the Board's twenty-three year

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[15] *See* footnote 11, *supra*.

[16] Section 106(a)(4) of the Act, 8 U.S.C. § 1105a(a)(4), provides that the "petition shall be determined solely upon the administrative record upon which the deportation order is based. . . ." Naturally, the administrative record contains not only the Board's decision but also the Immigration Judge's decision and the facts underlying both determinations.

policy of interpreting Section 212(c) to require aliens to have lawful domicile here for seven years following their admission as permanent residents. He argues that this policy is not supported by the language of the statute or its legislative history and that solely as a result of this erroneous interpretation he is ineligible for Section 212(c) relief.

B. The Standard Of Review

In his brief Tim Lok states that the question presented to this Court for review merely raises a question of statutory interpretation which he assumes is reviewable by the same rules of statutory construction applicable to courts of first impression. This assumption is unwarranted and wrong as a matter of law.

The decisions in the administrative record which are presented to this Court for review represent the interpretations applied to a statute by the agency charged with that statute's enforcement. In addition, the results of those decisions are consistent with the agency's interpretation of the statute since it was enacted and constitute the uniform policy of the agency toward situations of this type. Under these circumstances, the standard for review by this Court is extremely narrow. As the United States Supreme Court stated in *Udall* v. *Tallman*, 380 U.S. 1, 16 (1964):

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the

policy of interpreting Section 212(c) to require aliens to have lawful domicile here for seven years following their admission as permanent residents. He argues that this policy is not supported by the language of the statute or its legislative history and that solely as a result of this erroneous interpretation he is ineligible for Section 212(c) relief.

B. The Standard Of Review

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> first instance in judicial proceedings.' *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153. See also, *e.g.*, *Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583. 'Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. See also *Nazareno* v. *Attorney General of the United States*, 512 F.2d 936, 939-40 (D.C. Cir. 1975).

It is against this limited standard that Tim Lok's claims must be judged.

C. Under The Standards Set Forth In *Udall 1. Tallman*, The Board's Interpretation Of Section 212 (c) Is Reasonable.

In *Udall* v. *Tallman* the Supreme Court cautioned on the respect due the interpretations given to a statute by the agency charged with its administration and indicated that particular respect was due when the administrative practice at stake involved a contemporaneous construction of the statute which established a consistent policy for enforcing its provisions. The Board's decision in this case presents such an interpretation and must be examined with such deference.

In his brief Tim Lok asserts that his interpretation of Section 212(c) is supported by the very statutory language and legislative history on which the Board relied in 1953 to establish present Service policy with respect to this

eligibility requirement of Section 212(c).[17] The respondent contends that its twenty-three year policy is supported by the language of the statute, when examined in the context of its legislative history, and that the reasonableness of the Board's position should be upheld under the standards set forth in *Udall* v. *Tallman*.

Any inquiry into the propriety of an administrative interpretation of a statute must begin with the language of the statute itself. *United States* v. *Amer. Trucking Ass'ns.*' 310 U.S. 534, 542-544 (1939). However, where the language of the statute is silent on the question presented or where it may not reflect the spirit or intentions of its maker, resort must be had to the legislative and statutory history to determine if the administrative construction of the statute is consistent with the intentions of Congress. *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 619 (1966). Section 212(c) provides as follows:

> (c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraphs (30) and (31) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b).

While Tim Lok spends considerable time in his brief attempting to demonstrate that Section 212(c) does not support the Board's requirement that applicants for relief under its provisions be admitted to permanent

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[17] See Petitioner's Brief, at page 18.

residence for at least seven years, the plain language of the statute obviously contains no prohibition against the imposition of such a requirement if necessary to effectuate the intentions of Congress, the primary goal in every inquiry of this kind. Nor would such an interpretation render any provision of that statute meaningless since the applicant still would have to meet the requisite domiciliary requirement to be eligible for relief. Therefore, the language of the statute is clearly not dispositive of this inquiry and the statutory and legislative history must be examined to determine Congress' intent in this regard.

Section 212(c) was enacted in 1952 as part of the Immigration and Nationality Act of 1952. It replaced the Seventh Proviso to Section 3 of the Immigration Act Act of 1917 which read as follows:

> Provided further, (7) that aleins returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and under such conditions as he may prescribe. (8 U.S.C. 136)

A simple comparison of the eligibility requirements of the Seventh Proviso and Section 212(c) reveals Congress' intention to limit the salutory aspects of this discretionary relief to specific statutorily eligible aliens. See also, Gordon and Rosenfield, *Immigration Law and Procedure*, Section 7.4, page 7-29 (1966). In this context and in the absence of specific statutory language to the contrary, the Board properly examined the Congressional reports to determine Congress' wishes with respect to the seven year lawful domicile requirement. In pertinent part, those reports read as follows:

> *Senate Report No. 1515*:
>
> The suggestion was made that if the words "established after a lawful entry for permanent

residence" were inserted in the 7th proviso to qualify the domicile of the alien it would effectively eliminate practically all of the objectionable features, and at the same time the Attorney General would be left with sufficient discretionary authority to admit any lawfully resident aliens returning form a temporary visit abroad to a lawful domicile of 7 consecutive years.

The subcommittee recommends that the proviso should be limited to aliens who have the status of lawful permanent residence who are returning to a lawful domicile of 7 consecutive years after a temporary absence abroad.[18]

House Report No. 1365:

Under present law, in the case of an alien returning after a temporary absence to an unrelinquished United States domicile of 7 consecutive years, he may be admitted in the discretion of the Attorney General under such circumstances as the Attorney General may prescribe. Under existing law the Attorney General is thus empowered to waive the grounds of exclusion in the case of an alien returning under the specified circumstances even though the alien had never been lawfully admitted to the United States. The comparable discretionary authority invested in the Attorney General in section 212(c) of the bill is limited to cases where the alien had been previously admitted for lawful permanent residence and has proceeded abroad voluntarily and not under order of deportation.[19]

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[18] Sen. Rep. No. 1515, 82nd Cong., 2d Sess. 384 (1952).
[19] H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 51 (1952).

Based on these reports, especially the Senate report, Tim Lok claims it is reasonable to assume that had Congress wanted to further limit eligibility under Section 212(c), by requiring applicants to be permanent residents for seven years, it could have done so. The fact that it did not, he concludes, manifested its desire to allow aliens who are here lawfully, but have not been permanent residents for seven years, to obtain relief under Section 212(c).

However, based on these reports, the opposite conclusion, reached by the Board in *Matter of S, supra*, is also a reasonable one that has gained support since it was first adopted less than a year after Section 212(c) was enacted. *Guan Chow Tok* v. *Immigration and Naturalization Service, supra*, at 38; Gordon and Rosenfeld, *Immigration Law and Procedure*, Section 7.4(b)(4), page 7-32 (1966). The committee reports set forth above clearly reflect Congress' concern that Section 212(c) be limited to aliens who had been admitted to permanent residence for at least seven years. While it does not appear that this concern was explicitly set forth in that section, the language which did result, combined with the clear intent of both Houses of Congress, provides ample support for the Board's decision to read this requirement into the statutory language. *In Re Letters Rogatory Issued Dir. of Insp. of Gov. of India*, 385 F.2d 1017, 1020 (2d Cir. 1967).

Furthermore, under the standard for review set forth in *Udall* v. *Tallman*, the reasonableness of the Board's decision in *Matter of S* is enhanced by two factors. Initially, as even Tim Lok is forced to admit,[20] in reaching its decision the Board considered and thoroughly re-

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[20] See footnote 17, *supra*.

viewed *every* portion of pertinent statutory and legislative history available. Moreover, it did so less than a year after Section 212(c) was passed when the reasons for its enactment were still fresh in the minds of the Legislative and Executive Branches of the Government. Secondly, although Tim Lok cites no authority to support his proposed interpretation of Section 212(c), this Court, as well as the authors of Gordon and Rosenfield, *Immigration Law and Procedure*, a leading treatise on this subject, have both indicated their approval of the Board's interpretation. *Guan Chow Tok* v. *Immigration and Naturalization Service, supra;* Gordon and Rosenfield, *Immigration Law and Procedure*, Section 7.4(b)(4); See also *Francis* v. *Immigration and Naturalization Service, supra* at 273.

In his brief Tim Lok has presented a well-reasoned argument in support of what he believes is a proper interpretation of Section 212(c). We do not suggest that his contention cannot be made, or even supported in some manner, by the language of the statute or the minimal legislative history in existence today which discusses its enactment. Under the standard for review set forth by the United States Supreme Court and this Court, such a contention is unnecessary to sustain the Board's interpretation in this case. The Service has been given the responsibility of administering the Act by the Attorney General who requires it to render its decisions on the basis of a full administrative record and in conformity with the prior judicial decisions and legislative history applcable to the section of the Act being interpreted. Given the deference to which such administrative decisions are entitled, we suggest to this Court that the Board's interpretation of Section 212(c), made less than a year after the statute was enacted and consistently applied to cases of this type (including Tim Lok's) since

that time, represents a reasonable interpretation of that Section by the agency charged with its enforcement. In this context we submit that the Board's decision should be affirmed and the petition for review dismissed. *Pittston Stevedoring Corp., et al.* v. *Dellaventura*, page 4679, 4704-07, Docket No. 76-4009 (2d Cir. July 1, 1976).

POINT II

Even If Plaintiff's Interpretation Of Section 212 (c) Is Adopted By This Court, Petitioner Is Still Ineligible For Relief As A Matter Of Law.

Assuming *arguendo* that Tim Lok's proposed interpretation of Section 212(c) is adopted by this Court, that the Board's twenty-three year policy is found to be unreasonable, and that a permanent resident need only be returning to a lawful domicile of seven years regardless of the length of time he has been a permanent resident, nevertheless such an interpretation does not aid Tim Lok who remains ineligible for Section 212(c) relief on two separate grounds. Moreover, while Tim Lok argues that his case must be remanded if his interpretation is adopted by the Court because the Board's decision was based solely on its policy of requiring applicants for Section 212(c) relief to have been permanent residents for at least seven years, a remand is unnecessary in this case and not required as a matter of law. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1968).

All of the facts underlying Tim Lok's Section 212(c) application were found and applied by the Immigration Judge in his decision denying Tim Lok's request. In addition, those facts are largely undisputed and are contained, together with the Immigration Judge's decision,

in the administrative record which is the basis for this review.[21] Consequently, if this Court finds as a matter of law that Tim Lok is ineligible for Section 212(c) relief on grounds not discussed by the Board (although found by the Immigration Judge), it can still dismiss his petition without ordering it remanded to the Board, a useless exercise given the facts of this case. *NLRB* v. *Wyman-Gordon Co., supra.*

A. Tim Lok Has Not Had A Lawful Domicile In The United States For Seven Consecutive Years.

As Tim Lok recognizes in his brief, even if his interpretation of Section 212(c) is adopted by this Court, he still must prove his eligibility for this relief under that interpretation. This requires, *inter alia*, Tim Lok to show that he has maintained a lawful domicile in this country for seven consecutive years. Since Tim Lok's residence in the United States until 1971 was unlawful, as determined in his 1965 deportation hearing and by his subsequent deportation in 1971, he is *prima facie* ineligible for relief. Nevertheless, Tim Lok argues that although he was here unlawfully, the Service permitted him to remain and never attempted to enforce his deportation. Therefore, he concludes, that during this time he was in the United States with Service permission and, in that sense, lawfully. This contention is without merit.

Tim Lok entered this country in 1959 as a crewman authorized to remain no longer than twenty-nine days.[22]

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[21] See footnote 16, *supra.*

[22] Section 252 of the Act, 8 U.S.C. § 1282, permits the Service to admit alien crewmen for "the period of time (not exceeding twenty-nine days) during which the vessel or aircraft on which he arrived remains in port. . . ."

When he improperly remained longer than this time and was found to be deportable after an appropriate hearing, he was unlawfully in this country and subject to deportation. *Chim Ming* v. *Marks*, 367 F. Supp. 673, 679 (S.D.N.Y. 1973), *affd.* 505 F.2d 1170, 1171-72 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *Matter of T*, 6 I. & N. Dec. 778 (1954). Moreover, the Service's benevolence in allowing Tim Lok to remain in this country while he attempted to obtain a legal basis on which to stay here did not alter his *status* during that time. See Gordon and Rosenfield, *Immigration Law and Procedure*, Section 5.19 (1976). Thus, while Tim Lok was here permissibly from 1965 until 1971 he was not here *lawfully* during that time. Consequently, he is ineligible as a matter of law for Section 212(c) relief and his petition should be dismissed on that basis.

B. Tim Lok Did Not Procede Abroad "Voluntarily And Not Under An Order of Deportation."

In addition to his contention that he is eligible for Section 212(c) relief because he has resided lawfully in the United States for seven years, Tim Lok also claims eligibility under that Section because his trip to Hong Kong in 1971 was made "voluntarily and not under an order of deportation." [23] In this regard, he claims that while he was "technically" deported, he nevertheless left the country by paying his own way and only to obtain a visa and "his deportation was accomplished after the fact simply by amendment of the Immigration and Naturalization Service's records." Accordingly, Tim Lok concludes, the Service "could just as easily have amended its records to show that he left under voluntary departure", and he was "never really

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[23] See Petitioner's Brief, at page 27 and footnote 8, *supra*.

deported." [24] This contention does not withstand minimal scrutiny.

Initially, it must be noted that the Service never "amended" its records to reflect Tim Lok's deportation. Once the Service learned of his voluntary deportation in 1971, it noted this in its administrative file and this notation remained unchallenged until 1975, when Tim Lok discovered it precluded him from obtaining Section 212(c) relief following his narcotics conviction. In fact, when Tim Lok re-entered this country as a permanent resident in 1971, he assumed it was a proper decision by applying for, and obtaining, the necessary waiver of excludibility to be admitted. Thus, far from being a "fiction", Tim Lok's deportation was real enough for him to rely on it to acquire a waiver for re-entry.[25] Under these circumstances there is no question that Tim Lok left in 1971 under an order of deportation which renders him ineligible *as a matter of law* for Section 212(c) relief.

This conclusion is also supported by the provisions of the Act. Section 101(g) of the Act, 8 U.S.C. § 1101 (g), specifically provides:

> ". . . any alien ordered deported . . . who has left the United States, *shall* be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed." (Emphasis added).

The language of this statute is mandatory. It does not permit the Service to adopt the interpretation sug-

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[24] See Petitioner's Brief at page 27.

[25] See footnote 6, *supra*.

gested by Tim Lok, especially five years after his departure, and it has been so construed by the Service since the issue was first presented. *Matter of Igal*, 10 I. & N. Dec. 460 (1964). Since it is unquestioned that Tim Lok left the United States in 1971 under an order of deportation, it is clear that he is ineligible for Section 212(c) relief *as a matter of law*, regardless of the motivation for his departure or the Service's failure to enforce that order. Section 101(g) of the Act, 8 U.S.C. § 1101(g); Section 212(c) of the Act, 8 U.S.C. § 1182 (c); Gordon and Rosenfield, *Immigration Law and Procedure*, Section 5.19 (1976).

C. The Petition Should Be Dismissed.

Mindful of his tenuous legal posture in this appeal, Tim Lok has devoted a good portion of his brief toward persuading this Court to remand his case to the Board if it determines that the Board's interpretation of Section 212(c) was unlawful. However, clearly no purpose would be served by such a remand other than perpetuating Tim Lok's illegal stay in this country. The material facts of his case are contained in the administrative record and are straight-forward and not in dispute. Moreover, the questions presented by Tim Lok to this Court for review are ones of statutory interpretation which were confronted by the Board shortly after the Act was passed and resolved in a manner consistent with the language of the Act and Congress' intent. Thus, while Tim Lok suggests that the issues he raises under Section 212(c) are arguable and should be remanded to the Board for its consideration in the first instance, this is clearly not the case. The Board has considered each and every issue presented by Tim Lok in this appeal and has rendered decisions adverse to his position which have been relied on by the Service in administering Section 212(c) since it was first enacted, see *Matter of S*, *supra*, *Matter of T*, *supra*,

Matter of Igal, supra, and supported by this Court. *Guan Chow Tok* v. *Immigration and Naturalization Service, supra; Francis* v. *Immigration and Naturalization Service, supra.* Absent an adverse decision by the Court, there is no basis for Tim Lok to conclude that a remand would alter the Service's longstanding policy in this area. As the United States Supreme Court stated in *NLRB* v. *Wyman-Gordon Co., supra*, at 766 n.6:

> "To remand would be an idle and useless formality. (S.E.C. v. Chenery Corp.) does not require that we convert judicial review of agency action into a ping-pong game. . . . (T)he substance of the Board's command is not seriously contestable. There is not the slightest uncertainty as to the outcome of a proceeding before the Board. . . . It would be meaningless to remand."

In this context, we submit to this Court that it can and should affirm the Board's decision and thus terminate Tim Lok's unlawful stay in this country.

CONCLUSION

The petition for review hould be dismissed.

Dated: New York, New York
November 29, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-4204

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 29th day of November, 1976 she served two copies of the within Respondent's Brief

by placing the same in a properly postpaid franked envelope addressed:

Schiano & Wallenstein, Esquires
80 Wall Street
New York, New York 10005

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J Bryant

Sworn to before me this

29th day of November, 1976

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978